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CPLR 3404: Fourth Department Vacates a Dismissal for Abandonment Upon Condition that Neglectful Attorney Pay $1,000 in Costs

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had enunciated in *Allen*,[139] the Court of Appeals has embarked upon a highly questionable course. The Court has indeed imposed a heavy burden on litigants by requiring that they conduct an independent investigation in an attempt to discover evidence already possessed by a nonparty. This investigation very often may amount to nothing more than an unnecessary, costly, and time-consuming duplication of a completed investigation. Moreover, depending upon the subject matter of the investigation, a party may be put at a serious disadvantage if he is forced to litigate his claim without the aid of evidence obtained by a nonparty investigatory body. In a situation such as *Cirale*, for example, the investigation of a public agency with superior skills and manpower is likely to be more thorough than that of an ordinary litigant. The stringent requirements in New York for disclosure against a nonparty will most likely be given, therefore, serious consideration by the practitoner choosing a forum for his action.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3404: Fourth Department vacates a dismissal for abandonment upon condition that neglectful attorney pay $1000 in costs.

CPLR 3404 provides for the dismissal of cases which have been struck from the calendar and not restored within one year.[140] The purpose and principal advantage of rule 3404 is that it prevents cases *actually* abandoned from "haunting litigants" years later.[141] Unlike

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139 Professor Siegel has expressed the fear that trial judges who have "accumulated their experience under the much more restrictive approach (to disclosure) of the old Civil Practice Act" would not implement "the Court of Appeals' aim in Allen . . . ." 7B McKINNEY'S CPLR 3101, commentary at 27 (1970). Ironically, a number of trial judges did apply the *Allen* reasoning to CPLR 3101(a)(4), *see* note 123 *supra*, while the Court of Appeals in *Cirale* did not. *See* text accompanying notes 132-34 *supra*.

140 CPLR 3404 states:

> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

The Court of Appeals, in vacating the dismissal of an action which was litigated for 25 years, construed the phrase "deemed abandoned" as suggesting "a presumption rather than a fixed and immutable policy of dismissal . . . [which] was never intended to apply to a case where litigation in a cause was *actually* in progress." Marco v. Sachs, 10 N.Y.2d 542, 550, 181 N.E.2d 392, 395, 226 N.Y.S.2d 353, 358 (1962) (emphasis added). In Tactuk v. Freiberg, 24 App. Div. 2d 503, 261 N.Y.S.2d 438 (2d Dep't 1965), the Appellate Division, Second Department, held that a CPLR 3404 dismissal was unjustified where a motion was pending at the time of the dismissal and the parties were actively negotiating matters related to the action, noting there had been no abandonment *in fact*.

CPLR 3404 is limited to the supreme court and the county courts. Other courts, however, such as the Court of Claims, the district courts, and the New York City Civil Court, have similar rules. *See* 4 WK&M ¶ 3404.10 n.19.

141 4 WK&M ¶ 3404.01.

CPLR 3216 which enables a party to move for dismissal for want of prosecution,[142] CPLR 3404 is self-operating, *i.e.* after the one-year period has expired, no order is required for the case to be marked abandoned by the clerk. The court, however, may grant a motion to restore the case to the trial calendar after a motion to vacate the dismissal has been made.[143] This motion to vacate must be made within one year of the dismissal.[144] In addition, the moving party must demonstrate the existence of a meritorious cause of action, an absence of prejudice to the opposing party, and a satisfactory excuse for the delay.[145]

As a rule, the Fourth Department has been very strict in its requirements for vacating a 3404 dismissal.[146] This includes a specific refusal to recognize "law office failures"[147] as excusable neglect.[148] In this regard, the court's decision in *Schickler v. Seifert*[149] represents a liberalization of the traditional attitude of the court.

The plaintiffs in *Schickler*, having sustained substantial injuries

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142 A dismissal under CPLR 3216 is permissible only where one year has elapsed since the joinder of issue and a written demand for the resumption of prosecution has been served on the party against whom such relief is sought. That party may avoid dismissal of the action by filing a note of issue within 45 days following receipt of such service. CPLR 3216. *See also* 4 WK&M ¶ 3404.02.

143 Before moving to restore the case to the calendar following a CPLR 3404 dismissal, a motion to vacate the dismissal must be made under CPLR 5015. 4 WK&M ¶ 3404.04. The First Department has not strictly adhered to this requirement, choosing instead to ignore plaintiff's failure to accompany a motion to restore a case dismissed under CPLR 3404 with a CPLR 5015 motion. *See* Wavrovics v. City of New York, 13 App. Div. 2d 738, 214 N.Y.S.2d 818 (1st Dep't 1961); Radar-Electronics, Inc. v. Oscar Lenenthal, Inc., 8 App. Div. 2d 778, 186 N.Y.S.2d 107 (1st Dep't 1959). The Fourth Department, however, is apparently less hesitant to deny the motion to restore where plaintiff has made no motion to set aside the 3404 dismissal. *See, e.g.*, Campbell v. Puntoro, 36 App. Div. 2d 568, 317 N.Y.S.2d 768 (4th Dep't 1971).

144 CPLR 5015(a)(1).

145 *See* 7 CARMODY-WAIT 2d § 44.6, at 284 (1966).

146 *See, e.g.*, McIntire Associates, Inc. v. Glens Falls Ins. Co., 41 App. Div. 2d 692, 342 N.Y.S.2d 819 (4th Dep't 1973). There, the court refused to vacate a 3404 dismissal because of plaintiff's failure to accompany the application with an affidavit of merits by a "person having knowledge of the facts indicating a viable cause of action. Further, there was no showing of an absence of prejudice to defendant if the action were restored." *Id.* at 692-93, 342 N.Y.S.2d at 820. The court noted that under CPLR 5015(a)(1), a motion to open a default pursuant to 3404 requires the same proof of merit and excusable neglect needed to open any other default judgment.

147 The concept of "law office failure" is a very general one. It may involve errors or omissions by counsel or counsel's assistants (including office staff and independent contractors), counsel's personal problems or work load, or a fire destroying counsel's records. *See generally* 7 CARMODY-WAIT 2d § 44.27, at 307 (1968); 4 WK&M ¶ 3216.07.

148 *See, e.g.*, McIntire Associates, Inc. v. Glens Falls Ins. Co., 41 App. Div. 2d 692, 342 N.Y.S.2d 819 (4th Dep't 1973); Trudel v. Laube's Amherst, Inc., 40 App. Div. 2d 625, 336 N.Y.S.2d 503 (4th Dep't 1972) (mem.); Alaimo v. D & F Transit, Inc., 35 App. Div. 2d 776, 316 N.Y.S.2d 690 (4th Dep't 1970) (mem.); Delmonte v. Wozniak, 29 App. Div. 2d 735, 286 N.Y.S.2d 960 (4th Dep't 1968) (mem.).

149 45 App. Div. 2d 816, 357 N.Y.S.2d 225 (4th Dep't 1974) (mem.).

as a result of a 1969 automobile accident, initiated suits in 1970 and 1971. These suits were consolidated and placed on the general docket on September 21, 1971; plaintiffs' attorney, however, was unwilling to proceed at that time. In January and March of 1972 two motions by plaintiffs' attorney to file supplemental bills of particulars were denied. Apparently, plaintiffs' attorneys caused considerable delay by their efforts to include in the action injuries and expenses not originally listed in the initial bills of particulars. Subsequently, plaintiffs made a motion to restore the case to the calendar in September of 1972. On the return date, however, plaintiffs' counsel defaulted on his own motion. As a result, two days later the case was marked abandoned by the court. The Appellate Division, Fourth Department, was now faced with plaintiffs' motion to vacate the default.

Noting that the case had obvious merit[150] and that the motion to restore was timely,[151] the court granted plaintiffs' motion to vacate the CPLR 3404 dismissal.[152] The Fourth Department was careful to point out that, since the statute of limitations had run, plaintiffs' claims would be extinguished by a dismissal, and therefore "the blame for the delay and expense involved in these proceedings should be fixed where it rightfully belongs, upon the attorney for the plaintiffs."[153] Accordingly, the motion to vacate the dismissal was granted on condition that plaintiffs' attorney personally pay to defendants' attorneys $1000 in costs.[154]

Indeed, the neglect to prosecute dismissal is "drastic,"[155] particularly in light of the fact that the attorney is very often the party responsible for such neglect.[156] Where, as in *Schickler*, plaintiff would otherwise be barred by the statute of limitations from bringing a new action, his only remedy is a malpractice action.[157] This may prove to be costly and time consuming for the client and disastrous for the attorney. The imposition of substantial penalties upon "offending counsel

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150 *Id.* at 817, 357 N.Y.S.2d at 226. In *Schickler*, substantial injuries were involved and defendant had pleaded guilty to failing to yield the right of way. N.Y. VEH. & TRAF. LAW § 1142(a) (McKinney 1970).

151 45 App. Div. 2d at 817, 357 N.Y.S.2d at 226.

152 *Id.* at 816, 357 N.Y.S.2d at 226.

153 *Id.* at 817, 357 N.Y.S.2d at 226.

154 *Id.*

155 7B MCKINNEY'S CPLR 3216, commentary at 919 (1970), *quoting* Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967).

156 *See, e.g.*, Quinn v. Cohen, 37 App. Div. 2d 927, 326 N.Y.S.2d 161 (1st Dep't 1971) (per curiam); note 161 *infra*.

157 The measure of damages in such an action would be what the plaintiff-client would have recovered had he or she prevailed in the first action; this is determined by the jury in the malpractice trial. Gladden v. Logan, 28 App. Div. 2d 1116, 284 N.Y.S.2d 920 (1st Dep't 1967) (per curiam).

personally" certainly seems, as one commentator has suggested, the preferable approach.[158]

Such approach has been favored by the Second Department. In *Moran v. Rynar*[159] the court imposed a $250 penalty upon the neglectful attorney as a condition for vacating the dismissal.[160] In subsequent cases involving both 3404 and 3216 dismissals, the Second Department has consistently imposed similar small penalties upon the recalcitrant attorney as a condition to restoring the case to calendar.[161]

The *Schickler* court, while adopting the Second Department's approach, has nevertheless made an important departure from the rather lenient penalty of $250 generally imposed by that Department.[162] As one commentator wisely noted, the sum of $250 does not constitute a sufficient deterrent to neglectful prosecution.[163] The *Schickler* penalty of $1000 appears more realistic in that it is better designed to discourage attorney neglect and incompetence while the blameless litigant is still allowed his day in court.[164]

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5015(a): On motion, trial court uses inherent discretionary

158 7B MCKINNEY'S CPLR 3216, commentary at 919 (1970). In this commentary, Professor David D. Siegel, discussing a decision of the Court of Appeals for the Second Circuit to penalize the attorney rather than dismiss a meritorious cause of action, *see* note 155 *supra*, states that "[t]he New York courts might profitably adopt that approach for the *benefit* of the lawyer" who would otherwise face a malpractice suit and/or a disciplinary proceeding. *Id.* (emphasis in original).

159 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.).

160 In vacating the dismissal, the court stated:

> A proper exercise of discretion in cases like this requires a balanced consideration of all relevant factors, including the merit or lack of merit in the action, seriousness of the injury, extent of the delay, excuse for the delay, prejudice or lack of prejudice to the defendant, and intent or lack of intent to deliberately default or abandon the action. Also to be weighed in the balance is our strong public policy that actions be disposed of on the merits.

Id. at 718-19, 332 N.Y.S.2d at 140-41 (citation omitted).

161 *See* Cohen v. Tucker, 44 App. Div. 2d 706, 354 N.Y.S.2d 691 (2d Dep't 1974) (mem.) ($250 penalty); Urban v. Maloney, 40 App. Div. 2d 531, 334 N.Y.S.2d 122 (2d Dep't 1972) (mem.) ($250 penalty); Moran v. Rynar, 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.) ($250 penalty); Springer v. Morangio, 38 App. Div. 2d 852, 330 N.Y.S.2d 100 (2d Dep't 1972) (mem.) ($100 penalty).

162 *See* note 161 *supra*.

163 7B MCKINNEY'S CPLR 3216, commentary at 97 (Supp. 1974). Professor Siegel states:

> The sum of $250, or anything near it, does not seem to constitute a deterrent to neglectful prosecution. . . . [T]he irresponsible minority among lawyers who collect cases but do not prosecute them diligently will be favored even beyond the great generosity CPLR 3216 already shows them.

Id.

164 Notwithstanding the apparent logic of the *Schickler* decision, the lower penalty has been adhered to in recent First and Second Department cases. *See, e.g.*, Cichorek v. Cosgrove, 47 App. Div. 2d 883, 367 N.Y.S.2d 7 (1st Dep't 1975) ($350 penalty); Sommer v. Fucci, 47 App. Div. 2d 771, 365 N.Y.S.2d 249 (2d Dep't 1975) ($100 penalty).